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No. 95-808

In The

Supreme Court of the United States

October Term, 1995

SOUTHEASTERN EXPRESS CO., ET AL.,

Petitioners,

vs.

TRIAD SYSTEMS CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF BUSINESS TECHNOLOGY ASSOCIATION IN SUPPORT OF PETITIONERS

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I. INTEREST OF *AMICUS CURIAE*[1]

The Business Technology Association ("BTA") is a national and international organization representing approximately 6,500 independent business equipment systems dealerships. BTA's membership contains both independent service organizations ("ISOs") and dealers authorized by a manufacturer to market and service highly technical products to end-users. BTA is recognized as the major spokesperson for the industry. Premised upon BTA's commitment to service and integrity, one of BTA's principal organizational goals is to assist its members in providing the highest level of pre-sale, point-of-sale, and post-sale support to end-users of sophisticated office products. BTA achieves these goals through education and guidance offered to its members over the past sixty-six years.

As a non-profit organization representing business equipment and systems dealers as well as manufacturers, BTA has a substantial interest in this litigation because the products and systems that BTA's members sell, support and service are for the most part software-dependent. The Ninth Circuit's decision in *Triad Systems Corporation v. Southeastern Express Co. et al.*, 64 F.3d 1330 (9th Cir. 1995), that ISOs are violating the copyright laws merely by servicing a customer's equipment will have a grave and substantial impact on BTA's members and their customers. The Ninth Circuit's decision forecloses BTA members from offering service to their customers because

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[1] Counsel of record have consented to the filing of this *amicus* brief, and letters to that effect have been filed with the Clerk pursuant to Supreme Court Rule 37.

no BTA member will be able to service equipment without turning it on. This manifestly inhibits competition because no company other than the software developer or an authorized dealer will be able to access software in order to maintain equipment.

The effect of the *Triad* decision is that manufacturers will be able to prevent end-users of office automation products from contracting with anyone other than the manufacturer for service. The Ninth Circuit prevents a customer from using anyone but the manufacturer for service even though that customer has rightfully paid a license fee for use of software. Inhibiting a customer's use of hardware is the end result.

This result is contrary to the copyright laws as well as to our system of competition. Under the copyright laws, the copyright holder's rights must be balanced against the rights of the public to have access to the copyrighted work. The *Triad* court shifts that balance markedly in favor of copyright holders, and does so at the expense of end-users, who under the *Triad* decision will not be able to get competitive pricing because they will not be able to contract with the technician of their choice.

In simplest terms, the owner of equipment, rather than the manufacturer, should decide who shall service the product. In an already fragile service economy, the *Triad* decision deals what may be a fatal blow to companies that are members of BTA. If those member organizations cannot maintain a customer's office technology product, manufacturers will have a lock on the service industry and end-users will pay higher prices because

they will have no choice but to contract with the manufacturer for maintenance. Accordingly, BTA has a strong interest in the disposition of this case.

II. ARGUMENT

A. This Court should grant *certiorari* in order to clarify the application of the copyright laws to the use but not proliferation of computer programs.

The use of software in office automation products has become standard within the last few years. Maintenance and repairs of such systems cannot be accomplished without accessing the software that is sold or licensed with those machines. For years, BTA members serviced their customers' equipment by using the software that came with the equipment their customers purchased.

Prior to the Ninth Circuit's decision in *MAI Systems Corporation v. Peak Computer*, 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994), no ISO would have believed that it was committing copyright infringement by turning on a customer's computer, at the customer's request, in order to service it. In reaffirming the *MAI* decision, and taking it one step farther by holding that such a use does not constitute a fair use under 17 U.S.C. Section 107, the *Triad* court essentially foreclosed any ability that an independent service company has to service office technology products.

The *Triad* and *MAI* decisions do not take into account today's environment of pervasive software programs, and fail to consider the differences between traditionally

copyrighted works, such as books and music, and software. When someone reads a book or listens to music, in other words when someone uses the book or record, no infringement occurs. If someone were to make physical copies of a book or record and sell those copies, an infringement would clearly have occurred.

The same logic applies to computer programs. Mere use of a program is not an infringement, whereas proliferation of copies for sale would clearly be an infringement. In servicing a customer's equipment, BTA members do not proliferate copies of computer programs. BTA members are merely performing a service the customer contracted with those members to perform using software for which the customers have paid a valid license fee. This Court's review is critical in order to correct the Ninth Circuit's misapplication of copyright law to computer programs.

B. This Court should grant *certiorari* in order to review the important question of whether the copyright laws are violated when a computer is turned on by an independent service organization.

In reaching its conclusions, the *Triad* court relied on the unprecedented *MAI* decision, which held that loading a computer program into a computer's Random Access Memory ("RAM") constituted a copy for purposes of the copyright laws. The result of this decision is that any ISO performing service on office technology products, virtually all of which use software to operate, is violating the copyright laws. Taking this illogical holding to its

logical conclusion, ISOs such as BTA member organizations will essentially be prevented from servicing high-technology products that use software to function.

Not only is the Ninth Circuit's decision illogical, it is also contrary to the purpose of the copyright laws, which is to balance the rights of copyright holders against the rights of the public to have access to information. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). End-users who purchase office technology products have an expectation that they may use whatever comes with the machine in order to keep that machine running to its specifications. This includes hiring an ISO such as a member of BTA to maintain that machine. Under the Ninth Circuit's ruling, however, end-users' rights will be severely hindered because they will not be able to contract with anyone other than the manufacturer for service.

C. This Court's review is necessary to clarify whether end-users of office technology products should be considered "owners of a copy" under 17 U.S.C. § 117.

Under 17 U.S.C. Section 117, the "owner of a copy of a computer program may make or authorize the making of another copy or adaptation of that computer program provided: (1) that such a new copy or adaptation is created as an *essential step in the utilization of the computer program*, or (2) that such new copy or adaptation is for *archival purposes only* and that all archival copies are destroyed *in the event that continued possession of the computer program should cease to be rightful . . .* " (emphasis

added). If read logically, this statute gives end-users of office technology products the right to authorize a service organization to use the computer program that comes with the system in order to maintain that system.

The Ninth Circuit's reading of this statute, however, reaches the opposite result. According to the *Triad* court, the phrase "owner of a copy" means either the copyright holder or a person who purchased a copy of the program outright. *Triad*, 64 F.3d at 1333; *see also MAI*, 991 F.2d at 518 n.5. The copyright holder clearly has the right to make copies of his own program, and thus does not need the protections under 117. Because almost all end-users of office technology products license the software that comes with their machines rather than purchase it, the Ninth Circuit's reading of Section 117 renders that statute meaningless.

The only logical reading of the statute is that licensees of computer programs constitute "owners of a copy" and thus may authorize a third party to use the computer program as long as no copies are proliferated. This is the only reading consistent with subsection (2) of Section 117, which uses the concept of rightful possession, not ownership.

ISOs do not proliferate copies: after servicing a customer's piece of equipment, the ISO leaves the customer's site and makes no addition to the number of copies of the computer program that originally existed at the customer site.

III. CONCLUSION

The *Triad* decision is harmful not only to BTA members, but also to end-users because it severely limits an end-user's choice of service provider by curtailing that customer's right to access to a computer program for which the customer has paid a license. This result is contrary to the copyright laws, and should be reviewed in order to prevent what is certain to be permanent damage to this country's service industry.

Respectfully submitted,

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